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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DEWAYNE COOPER, JR.,

Defendant and Appellant.

F061868

(Super. Ct. No. RF005900B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Cory J. Woodard, Judge.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Gomes, J. and Detjen, J.

STATEMENT OF THE CASE

On August 25, 2010, appellant Anthony Dewayne Cooper, Jr., was charged in an information with receiving stolen property (Pen. Code, § 496, subd. (a)).¹ The information also alleged four prior prison term enhancements (§ 667.5, subd. (b)). Cooper filed a suppression motion pursuant to section 1538.5. The trial court conducted a lengthy hearing on Cooper's motion in late October and early November 2010. On November 4, 2010, the trial court denied Cooper's suppression motion.

After the beginning of a jury trial, Cooper waived his constitutional rights pursuant to *Boykin/Tahl*² and pled no contest to the charge.³ Cooper also admitted the special allegations. On February 1, 2011, the trial court suspended imposition of sentence, placed appellant on probation for three years, and ordered appellant to serve 253 days in jail with credit for time served.

On appeal, Cooper contends the trial court erred in denying his suppression motion. We disagree and affirm the trial court's judgment.

A. Preliminary Hearing⁴

Detective Cory Ballesterio was on duty on 11:00 a.m. on July 28, 2010, with the Ridgcrest Police Department. Ballesterio and his partner, Detective Kenneth Merzlak, responded to an address on West Kinnett to investigate a burglary that had just occurred. The detectives contacted Michael Avery, who had a video surveillance system at his home showing that someone had entered his garage and stole several power tools 10 to 15 minutes before the detectives arrived. Michael Brito was identified as the person in the surveillance video.

¹Unless otherwise designated, all statutory references are to the Penal Code.

²*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

³Cooper executed a felony advisement of rights, waiver and plea form acknowledging and waiving his constitutional rights.

⁴Judge Dellostritto presided over the preliminary hearing. Judge Woodward presided over the suppression hearing.

Ballestero circled a block radius around the victim's home for about 20 minutes. Ballestero saw Cooper's car parked on West Ward, at an address directly behind the victim's home.

Cooper was stopped at the Albertson's parking lot in Ridgecrest. Stolen tools were located in the rear of Cooper's car in the rear driver's side, a foot and a half behind Cooper. Ballestero stated that he stopped Cooper because his car had a cracked windshield. Cooper explained that the tools were left in his car by his friend, Mike, after Cooper gave him a ride. When the detectives showed Avery the power tools that they had just recovered from Cooper after a traffic stop, Avery identified the tools as his.

After Cooper was arrested, he was brought to the police station and read his *Miranda* rights.⁵ Cooper waived his right to remain silent and admitted to the detectives that he thought the power tools in his car had been stolen. When Cooper agreed to give Brito a ride, Brito placed the tools in the back of Cooper's car. The tools were located inside an open backpack.

Detective Merzlak explained that the stolen tools were found in a black backpack. When Merzlak viewed the video, he identified Brito wearing a backpack as he walked past the surveillance camera. Merzlak stated that during the interrogation, he asked for and received permission from Cooper to look at his cellular phone. Merzlak found an outgoing text message sent at 11:04 a.m. on Cooper's cell phone stating that Cooper had some power tools for sale and asking if anyone was interested.

B. Suppression Hearing

Prosecution Testimony

The suppression hearing commenced on October 26, 2010. The preliminary hearing transcript was not incorporated into the record. Ballestero testified that he and Merzlak were riding together. The victim had described the burglar as White. Cooper is

⁵*Miranda v. Arizona* (1966) 384 U.S. 436.

African-American. Ballestero explained that he and Merzlak drove around the area of the burglary for 20 minutes looking for the burglary suspect, driving in a radius of one block.

When Ballestero conducted a traffic stop of Cooper, Ballestero was aware that he was on parole. Ballestero had checked Cooper's parole status 12 days earlier on July 16, 2010.⁶ Ballestero was aware of other parolees who had been discharged from parole and there were "mechanisms" by which he was informed when parolees came to the community and when they were discharged from parole. In the prior year and a half or so, Ballestero had come into contact with Cooper four times. Ballestero was not sure of Cooper's discharge date from parole or the precise amount of time Cooper had been on parole. During the July 16th stop, Ballestero confirmed both from Cooper and the dispatcher that Cooper was still on parole.

Ballestero never received notification that Cooper had been discharged from parole. Ballestero had weekly contact with Edmond Cooper, Cooper's parole agent. Agent Cooper and the police dispatcher routinely inform Ballestero when parolees have been discharged from their parole.

Ballestero pulled over Cooper because he was on parole and had a cracked windshield on the passenger side of the car.⁷ Ballestero explained that he pulled over Cooper because the crack in the windshield impeded Cooper's vision on the passenger side of the windshield and constituted a violation of Vehicle Code section 26710.⁸

⁶The events of July 2010 will hereinafter be referred to without reference to the year.

⁷During the hearing, Ballestero was shown defense exhibits of a dirty windshield that did not appear to have a visible crack in it.

⁸Vehicle Code section 26710 provides:

"It is unlawful to operate any motor vehicle upon a highway when the windshield or rear window is in such a defective condition as to impair the driver's vision either to the front or rear.

"In the event any windshield or rear window fails to comply with this code the officer making the inspection shall direct the driver to make the windshield and rear window conform to the requirements of this code within 48 hours. The officer may also arrest the driver and give him notice to appear and further require the driver or the owner of the vehicle to produce in court satisfactory evidence that the windshield or rear window has been made to conform to the requirements of this code."

Ballestero contacted Agent Cooper by phone after Cooper was arrested to have a parole hold placed on him while they were still in the Albertson's parking lot. Ballestero denied telling Agent Cooper that he had observed suspect Brito at Cooper's home and that he had searched Cooper's home. At the time Ballestero spoke to Agent Cooper, he did not discuss reading any text messages on Cooper's phone. Ballestero stated that when he conducted the traffic stop of Cooper he was not sure what he would come across, but conceded the stop "was probably [a] deviation" from the burglary investigation.

Defense Testimony

Merzlak was called as a defense witness and testified that he and Ballestero responded to a radio call concerning a burglary. The burglary suspect was a White male on foot wearing a red shirt and black pants. Merzlak and Ballestero checked the area for about 20 minutes. Ballestero was driving the patrol car.

The burglary victim, Avery, lives on the north side of Ridgecrest. Cooper lives on the south side of Ridgecrest. The two locations are between two and four miles apart. Ridgecrest is not a large city. The detectives first saw Cooper's car parked in a trailer park on West Ward. The north area Albertson's is three blocks from the trailer park. Avery also lives close to that Albertson's. The detectives continued to conduct an area check.

The detectives saw Cooper driving his car, which had a crack in the front windshield that was about 12 inches long. Merzlak said that one defense exhibit, a photograph depicting the windshield of Cooper's car, appeared to show a crack in the windshield although it was hard to see because of the dirt and debris on the windshield. The detectives also knew Cooper was on parole. They followed Cooper a short distance from the trailer park to the Albertson's parking lot.

Merzlak and Ballestero had conducted a traffic stop of Cooper 10 to 12 days earlier. The detectives did not confirm Cooper's parole status during this earlier traffic stop until after Cooper was stopped. Cooper was stopped on this occasion because the

registration tag on the license plate was not current. After stopping Cooper, the detectives discovered there was a temporary registration sticker on the windshield. Merzlak did not notice a cracked windshield on that occasion. During the first traffic stop, the detectives learned from Cooper, and from dispatch, that Cooper was on parole.

Merzlak was aware of Cooper's status as a parolee and had been in regular contact with Agent Cooper. Merzlak had contacted Cooper on approximately 10 prior occasions and on each of those occasions, Cooper was on parole. After briefly following Cooper's car, observing a crack in the windshield, and knowing that Cooper was on parole, the detectives conducted a traffic stop.

There were several defense photographs of the front windshield of Cooper's car. Ballestero, Timothy Farris, the tow truck driver, and Officer Nathaniel Lloyd could not identify the crack from the photographs because of dirt, sun glare, and the angle from which the pictures were taken. Merzlak could see the crack in one photograph.

Agent Cooper had regular conversations with law enforcement officers in Ridgecrest. On July 28, Agent Cooper talked to Ballestero by phone concerning the new criminal allegations that Cooper had received stolen property following a residential burglary. Ballestero was seeking a parole hold on Cooper.

Agent Cooper's understanding of the facts as recorded in his report was that Ballestero had observed Cooper at his home, had searched Cooper's home, and discovered stolen tools in a backpack. Agent Cooper also recalled that Ballestero reported that "they" had discovered a text message on Cooper's cell phone.

Agent Cooper later conducted his own investigation, read the arrest report, and talked to Ballestero and he then realized the information that he recorded in his report was "a misinterpretation of what Detective Ballestero" had told him. Agent Cooper was not concerned about the factual discrepancies between his report and the police account of events because his report is merely an administrative document that states probable cause for a parole hold. Agent Cooper did not believe that Ballestero gave him any

misleading information and conceded that his report was not as accurate as it should have been. Mistakes in parole reports often occur.

Appellant's father, Anthony Dewayne Cooper, Sr. (father), testified that his son was paroled from prison and lived with him in Ridgecrest. The father explained that his son had been stopped by the Ridgecrest Police Department 25 or 30 times in the previous year and was himself present for "a couple" of those stops. According to the father, his son's car did not have any cracks in the windshield.

Rebuttal Testimony

Ballestero was called as a prosecution rebuttal witness and denied lying to Agent Cooper during their phone conversation. Regarding the traffic stop on July 16, Ballestero explained that the temporary registration sticker was not visible until they stopped the car. Because they knew Cooper was on parole, the detectives continued to search his car on that occasion. Cooper was not given any traffic citation as a consequence of that traffic stop. The crack on Cooper's windshield was horizontal and between four and six inches long.

Prior to the hearing, Merzlak and Ballestero went to the car impound lot and observed the same crack in the windshield that they saw on July 28. Merzlak did not think the crack on Cooper's windshield was easily depicted in the defense photographs, although Merzlak could see the crack in defense exhibit L. Merzlak did not take photographs of the windshield of Cooper's car. About an hour after the July 16th traffic stop, Merzlak learned from the dispatcher that Cooper would not be discharged from parole until 2012 and informed the prosecutor of this fact after his initial testimony.⁹

Farris towed Cooper's 1991 Chevrolet Caprice on July 28th. Farris noted in the tow form he executed that there was a crack on the passenger side of the front

⁹The probation report indicates that Cooper was most recently paroled on December 2, 2009.

windshield. Farris remembered that when the detectives came to the tow yard to examine Cooper's car, they took photographs of it.

Officer Lloyd filled out an impoundment form on Cooper's car. Lloyd noted that there was damage on the passenger side of the front windshield. The crack was a half oval that ran across half of the windshield. The crack was 20 inches long. The crack ran halfway through the windshield.

Ballestero and Merzlak were called as defense rebuttal witnesses. Ballestero stated that he took photographs of Cooper's car at the tow yard, but had not given them to the prosecutor because his main reason for stopping Cooper was because Cooper was on parole. Merzlak stated that he did not take photographs of Cooper's car and did not recall whether photographs of it were taken.

Motion to Reopen Suppression Motion

Defense counsel filed a motion to reopen the suppression hearing, alleging that the day after it was completed, the prosecution provided the defense with police incident logs that purportedly refuted the detectives' testimony that they were in the same patrol car when they stopped Cooper on July 16. The court granted the motion.

Ballestero testified that during the July 16 traffic stop of Cooper, he and Merzlak were riding in the same patrol car. Ballestero was driving and Merzlak was communicating with the dispatcher. Ballestero recalled that Merzlak conducted all of the radio traffic with the dispatcher that day.

Ballestero's call sign is D4. The dispatcher's "RIMS" report contained a clerical error showing that Merzlak arrived after Ballestero when, in fact, Merzlak was with Ballestero. The indication in the dispatcher's report that Merzlak arrived five minutes after Ballestero was made in error. On July 16, Merzlak verified Cooper's parole discharge date.

Sergeant Justin Dampier provided incident logs for Cooper's July 16th traffic stop and his July 28th arrest. Dampier explained that there were two problems with the RIMS

system. One was input error—how they type in information—and the other was a software bug reported to the vendor, Sun Systems, that made input confusing.

Dampier further explained that time and date entries on dispatch logs do not represent the times and dates events actually occurred because the RIMS system reflects the times and dates the information gets entered by the dispatcher. Because dispatchers are also handling 911 calls, it can be five or ten minutes before they record information given to them by an officer.

The dispatch tapes and the incident logs are two independent systems. A dispatcher may be handling 50 events at a time. Dispatchers are watching multiple computer screens, monitoring radio traffic, and handling 911 calls. When there is a lot going on, dispatchers can miss things. Dispatch reports reflect the time dispatchers input information, not the time the incident actually occurred. During the traffic stop on July 16, Ballesterio and Merzlak were in the same patrol car. The dispatchers are not always aware when two officers are traveling together or are in two patrol cars.

At the conclusion of the hearing, the court found that it did not appear that if there was a crack in the windshield, it would impair one's vision through the windshield. The court observed parolees are subject to random searches and that the detectives here were aware that Cooper was on parole. The court noted that random, or arbitrary, searches are those that are unrelated to rehabilitative, reformatory, or legitimate law enforcement purposes. Viewing the matter objectively, the court found that the parole stop was legal and denied the suppression motion.

DISCUSSION

Cooper asserts the detectives did not have a legitimate law enforcement or parole objective in conducting the traffic stop, and there was not substantial evidence to support the trial court's finding that the detectives conducted a valid parole search. Cooper contends that the trial court ignored the detectives' motivation in conducting the traffic stop and improperly relied on the detectives' knowledge that he was on parole. We reject Cooper's contentions and affirm the trial court's ruling.

Standard of Review

In ruling on a motion to suppress, the trial court finds the historical facts, selects the law, and applies it to determine if the law, as applied, has been violated. We review the trial court's resolution of the factual inquiry under the deferential standard of substantial evidence. The ruling by the trial court is a mixed question of law and fact subject to independent review. On appeal, we do not consider the correctness of the court's reasons for its decision, only the correctness of the ruling itself. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

We review a trial court's ruling on a motion to suppress evidence as a mixed question of law and fact. We accept the trial court's findings of fact, whether express or implied, as long as they are supported by substantial evidence. We exercise independent judgment, however, upon the legal question of whether a search is constitutionally reasonable. (*People v. Hughes* (2002) 27 Cal.4th 287, 327; *People v. Glazer* (1995) 11 Cal.4th 354, 362.) We determine de novo whether the search was arbitrary, capricious, or harassing, and thus unreasonable and unconstitutional. (*People v. Sardinias* (2009) 170 Cal.App.4th 488, 493-494.)

Section 3067, subdivision (a) provides, "Any inmate who is eligible for release on parole ... shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause."

In *Samson v. California* (2006) 547 U.S. 843, 846 (*Samson*), the court held that a suspicionless parole search, conducted under the authority of section 3067, was not unreasonable under the Fourth Amendment. The court reasoned that a parolee remains in the custody of correctional authorities during the remainder of the parolee's prison term and must comply with the terms and conditions of parole. (*Samson*, at p. 850.) The California parole search condition required the parolee to submit to a search by a parole or police officer at any time without suspicion. (*Id.* at p. 852.) Under the circumstances,

the parolee did not have a legitimate expectation of privacy that society would recognize. (*Ibid.*)

In contrast, the legitimate governmental interests involved in suspicionless parole searches were substantial. (*Samson, supra*, 547 U.S. at p. 853.) Statistics showed that parolees were likely to commit future crimes, and most parolees required intense supervision to combat recidivism and promote positive citizenship. (*Id.* at pp. 853-854.) Imposing a reasonable suspicion requirement would give parolees greater opportunity to anticipate searches and conceal criminal activity. (*Id.* at pp. 854-855.)

People v. Reyes (1998) 19 Cal.4th 743, which *Samson* cited with apparent approval (*Samson, supra*, 547 U.S. at p. 856), held that officers could search a parolee's property without reasonable suspicion based on the parole search condition as long as the search was not arbitrary, capricious, or harassing. (*People v. Reyes, supra*, at pp. 753-754.) A parole search may be arbitrary, capricious, or harassing if it is made too often, at an unreasonable hour, if unreasonably prolonged, or for other reasons amounting to arbitrary or oppressive conduct by searching officers. (*Ibid.*) For example, a search is arbitrary when its motivation is unrelated to rehabilitative, reformatory, or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee. (*Id.* at p. 754.)

Substantial Evidence and Officer Motivation

Cooper argues it was unreasonable for the trial court to find that the detectives knew he was on parole during the July 28th traffic stop because they did not know his parole release date and, during the preliminary hearing, Ballesterio originally relied on the cracked windshield on Cooper's car as the basis for stopping him. Cooper challenges Merzlak's credibility when Merzlak testified in rebuttal that shortly after the July 16th traffic stop, Merzlak confirmed that Cooper was scheduled for release on parole in 2012. Cooper further argues the detectives' "deviation" from the burglary investigation to stop him indicated the detectives were not engaged in a legitimate law enforcement purpose.

The premise of Cooper's attack on the validity of the parole search rests on his argument that the detectives stopped a burglary investigation to arbitrarily stop him. Cooper attacks the credibility of the detectives, alleging that they kept changing their testimony concerning the actual purpose of the traffic stop.

Even if we accept *arguendo* that the detectives' traffic stop of Cooper was a deviation from the burglary investigation, we still conclude that there was a legitimate, parole-related purpose in conducting the stop. This is especially so because both detectives were well aware of Cooper's status as a parolee.

We reject Cooper's contention that the detectives' testimony lacked credibility because according to him they kept changing their reason for conducting the July 28th traffic stop. This is not an accurate depiction of the detectives' testimony. There is little relevance to the fact the Ballestero did not mention Cooper's parole status as a reason for stopping him during his preliminary hearing testimony. The preliminary hearing did not include a suppression motion and was a relatively short evidentiary hearing.

Furthermore, neither party sought to incorporate the preliminary hearing transcript into the suppression hearing, and different judges presided over the preliminary and suppression hearings. Without a stipulation by the parties that the trial court may consider the preliminary hearing transcript, we do not consider it on appeal. (*People v. Fisher* (1995) 38 Cal.App.4th 338, 341.) The accurate depiction of Ballestero's testimony at the suppression hearing was that he stopped Cooper both because of the crack in the windshield of Cooper's car and because Cooper was a known parolee.¹⁰ We

¹⁰After hearing lengthy testimony concerning the location and size of the crack in Cooper's front windshield, the trial court found that the crack would not have impaired Cooper's vision. Respondent argues the detectives were still permitted to stop Cooper to investigate whether the windshield crack impeded Cooper's view. *People v. Superior Court (English)* (1968) 266 Cal.App.2d 685, 689-690, held that an officer was justified in stopping a car and placing his head inside it to determine whether a crack in the windshield obstructed the driver's vision. The *English* case appears to support respondent's argument that the officers could stop Cooper to at least investigate whether the crack they observed impaired Cooper's view. Because we find that the parole search was valid, however, we do not reach this issue.

therefore reject Cooper's assertion that the detectives kept changing their rationale for conducting the traffic stop.¹¹

There is nothing in the record to suggest that the detectives' search of Cooper's car was motivated by animus rather than a legitimate law enforcement purpose. The record indicates the detectives had conducted a records check 12 days earlier and learned from the dispatcher and Cooper himself that Cooper was on parole at that time. Although the detectives received regular communications from Agent Cooper regarding changes in the status of parolees, they received no such update between July 16th and July 28th.

About an hour after the July 16th traffic stop, Merzlak learned from the dispatcher that Cooper's discharge date from parole was in 2012. Cooper provided no evidence to the contrary at the suppression hearing. We conclude there was substantial evidence that the detectives knew of, and verified, Cooper's status as a parolee, and they could reasonably rely on their knowledge of that status as a basis for the July 28th traffic stop.

We find Cooper's argument that the detectives could not have known he was on parole because they did not know the length of his parole or his parole release date to be devoid of any merit under the facts of this case. The only reasonable inference from this record is that the search was directly related to the rehabilitative, reformatory, and legitimate law enforcement purposes of protecting the public and monitoring whether Cooper was complying with the terms of his parole.

The suspicionless search of Cooper's car is entirely consistent with the deterrent purposes of the warrantless search condition. (*People v. Reyes, supra*, 19 Cal.4th at p. 753.) The legitimate law enforcement purposes served by the officers' search of

¹¹In his rebuttal testimony, Merzlak testified that about an hour after the July 16 traffic stop, he learned from the dispatcher that Cooper would not be discharged from parole until 2012. We refuse Cooper's invitation to discount the credibility of Merzlak's testimony where, as here, the trial court failed to find that this testimony lacked credibility. Indeed, we are bound by the trial court's evaluations of credibility on an appeal from a suppression motion. (*People v. Troyer* (2011) 51 Cal.4th 599, 613.) Even if the trial court's factual findings on this point were unclear, appellate courts must infer a finding of fact favorable to the prevailing party. (*People v. Middleton* (2005) 131 Cal.App.4th 732, 738.)

Cooper's car were to determine whether he was complying with the terms of his parole and to protect the public. The search served both of these purposes because it showed that Cooper was breaking the law by possessing stolen property, and it protected the public from Cooper's illegal acts. (*Id.* at p. 752.)

Cooper finally argues that the trial court improperly failed to evaluate the officers' motivation in stopping him. Cooper submits the search was arbitrary: the officers articulated no legitimate law enforcement purpose for searching his car because they deviated from the burglary investigation to conduct the traffic stop. There is no evidence in this record that this brief parole search of Cooper, in broad daylight while Cooper was driving on a public street, was arbitrary or capricious. (See *People v. Middleton*, *supra*, 131 Cal.App.4th at pp. 738-740 [knowledge of suspect's parole status sufficient to justify parole search of hotel room known to be registered to suspect]; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004-1006 [probation search for stolen property, weapons, and gang paraphernalia not arbitrary and had legitimate law enforcement objective].)

Although *In re Anthony S.* found that where a law enforcement search is unrelated to rehabilitative, reformatory, or law enforcement purposes it is arbitrary, it did not hold that officers had to articulate a legitimate law enforcement purpose to justify a suspicionless search. We therefore reject Cooper's assertion that the trial court erred in finding that a suspicionless parole search of him was valid.

DISPOSITION

The judgment is affirmed.